Record. Ch. I.

SUPREME COURT OF THE UNITED STATES.

No. 195. 116. 44 38 36. 34 33.

CHARLES McDERMOTT, PLAINTIFF IN ERROR,

vs.

MARTIN R. P. MATHIS, SHERIFF.

IN ERROR TO SUPREME COURT OF STATE OF ARKANSAS.

GEO. S. GIDEON, printer, 511 Ninth street, Washington, D. C.

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Gideon, print.

STATE OF ARKANSAS,
In the Supreme Court.

Be it remembered, that at a supreme court of the State of Arkansas, begun and held at the court-house, in the city of Little Rock, on the 2d day, being the first Monday in January, A. D. 1860, were the following proceedings, before the Hon. Elbert H. English, chief justice, and the Hon. Freeman W. Compton, judge, on the 4th day of February, in said term, in the case of—

CHARLES MCDERMOTT, Appellant,
vs.
MARTIN R. P. MATHIS, as Sh'ff, &c., Appellee.
} No. 278.—Appeal from Chicot Circuit Court in Chancery.

Be it remembered, that heretofore, to wit, on the 31st day of December, A. D. 1858, the said appellant filed in the office of the of said supreme court the transcript of the record in this cause, which is in the following words, to wit:

Pleas before the Honorable John C. Murray, judge of the 2d judicial circuit of the State of Arkansas, at a court begun and holden at the court-house, in the town of Lake Village, Chicot county, Arkansas, on the 1st Monday after the fourth Monday in September, A. D. 1858, on the 4th day of the term, and on the 7th day of October, A. D. 1858, among other were the following proceedings, to wit:

CHARLES MCDERMOTT, Complainant,
vs.
MARTIN R. P. MATHIS, Defendant.

Be it remembered, that heretofore, to wit, on the 29th day of March, A. D. 1858, the said complainant, by his solicitors, filed in the office of the clerk of said court his bill for injunction in said cause, which is in the words and figures following, to wit:

Bill.

THE STATE OF ARKANSAS,
County of Chicot.

To the Honorable Theodorick F. Sorrells, Judge of the Circuit Court of Chicot County, in Chancery sitting:

Humbly complaining, showeth unto your honor, your orator, Charles McDermott, of the county of Chicot and State of Arkansas, that he is the owner of the following lands, lying in said county, to wit:

S. E. $\frac{1}{4}$ of	section	18,	township	13,	range	3 west.
S. W. $\frac{1}{4}$	"	17,	"		"	"
S. E. $\frac{1}{4}$	"	7,	"		"	"
E. $\frac{1}{2}$ of N. E. $\frac{1}{4}$	"	7,	"		"	"
W. $\frac{1}{2}$ N. W. $\frac{1}{4}$	"	7,	"		"	"
E. $\frac{1}{2}$ of	"	15,	"		"	"
N. $\frac{1}{2}$ of	"	6,		14,	"	"
N. $\frac{1}{2}$ of	"	5,	"		"	"
N. $\frac{1}{2}$ of	"	4,	"		"	"
N. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$	"	4,	"		"	"
S. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$	"	4,	"		"	"
S. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$	"	7,	"		"	"
N. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$	"	18,	"		"	"
Section		31,		13	"	3
Section		32,	"		"	"
E. $\frac{1}{2}$	"	30,	"		"	"
S. W. $\frac{1}{4}$	"	30,	"		"	"
N. W. $\frac{1}{4}$	"	30,	"		"	"
Section		19,	"		"	"
"		20,	"		"	"
"		5,	"		"	"
S. $\frac{1}{2}$	"	29,	"		"	"
N. E. $\frac{1}{4}$	"	29,	"		"	"
E. $\frac{1}{2}$ N. W. $\frac{1}{4}$	"	29,	"		"	"
S. $\frac{1}{2}$	"	32,	"		"	"
N. W. $\frac{1}{4}$	"	"	"		"	"
W. $\frac{1}{2}$ N. E. $\frac{1}{4}$	"	"	"		"	"
S. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$	"	"	"		"	"
S. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$	"	33,	"		"	"
S. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$	"	33,	"		"	"

And your orator showeth, that by an act or pretended act of the general assembly of this State, entitled "An act to provide for making and repairing levees in Chicot county," approved 7th January, 1857, and an act or pretended act entitled "An act supplementary to an act passed at the present session of the general assembly, entitled An act to provide for making and repairing levees in Chicot county, approved 7th January, 1857," it is enacted and declared that there shall be levied and collected, in the county of Chicot, an annual levee tax on all alluvial lands in said county that would be benefited by levees, and which are or shall be taxable for State revenue, and the rate of such tax shall be fixed by the county court of said county for each year, commencing with the year A. D. 1857, of not less than one-fourth of one per centum, nor more than one per centum, upon the assessed value of said land, provided that no land which shall be so taxed for levee purposes to raise said tax

shall he valued at less than ten dollars per acre, and each of the levee inspectors provided for by said first mentioned act shall assess all the lands in his district which are or shall be taxable under this act, and shall make and certify, under oath, to the clerk of said county, his assessment list, and the clerk shall ascertain and state upon the tax book the amount of levee tax chargeable upon such tract of land, according to the valuation of said land assessed in the manner aforesaid, and in accordance with the order of the county court, fixing the rate of the levee tax, and the sheriff shall collect said tax and account for the money in accordance with law, and such levee inspector shall be sole judge of what lands would be benefited by levee work, and shall embrace in his assessment list only such lands as he shall deem of that description; that the first section of said first act provided, that at each general election thereafter, there should be elected a levee inspector for each levee district in said county, but that no person shall vote in the election of said levee inspector who does not reside on or cultivate alluvial lands in the county, subject to be assessed and taxed under the provisions of said act, but that the county court of said county should, at the first term holden after the passage of said act, appoint or elect, for the county of Chicot, five levee inspectors, who shall be qualified according to the provisions of said act, and who should constitute the board of inspectors for said county, and who should hold their office until their successors should be duly elected and qualified; and the persons so appointed or selected by the county court should, as soon as may be practicable, be served with a notice thereof by the sheriff of the county, which notice should be prepared and delivered to him by the clerk, and the person so appointed and notified without delay, qualify and meet at the court-house, organize and proceed to discharge the duties, and perform the duties so required by said act. It was further declared by said act that the said levee inspectors should, at as early a day as practicable, meet at the court-house and organize, by electing one of their body president of their board, whose duty it was to preside over their meetings; that a majority of said board should constitute a quorum to transact business; that said board should meet at the court-house on the first Monday of May and November in each year, and at such other times as they may deem necessary; and that they should have power to make such rules and regulations as they may from time to time deem necessary.

By the 4th section of said act it was made the duty to appoint a treasurer, who should hold his office during the pleasure of the board, to whom the sheriff, whenever called upon by him, should pay over all the moneys collected under said act.

By section 5th, it was made the duty of the inspectors to lay off the county into levee districts, of suitable and convenient

size for one inspector to perform the duties of, and that in all future elections there are to be elected one inspector for each of said districts, and every inspector is required to reside in the district for which he is elected, and be a freeholder, and that thereafter the board should consist of the whole number so elected.

By section 7 it was declared to be the duty of said inspectors, at their meetings on the first Monday in May in each year, to order the levees at the most important points in each of said districts to be repaired or built.

By section 8 the levee inspector, together with two free householders of his district, was to lay off the lands therein directed by the board to be built, and that by section 9 he was to let out the building or repairing levees in his district.

Section 15 of said act declares that the assessment and levy of said taxes should be made by the county court, by an order of said county court, designating the amount per acre, and the *item* of payment of said tax, which order shall be published for four weeks in some newspaper in the State, and a copy thereof be put up at some public place in each township in the county, and it shall not be necessary in any such order of assessment and levy to designate the said lands, either by numbers or other description; but upon the making and publication of such order, that all lands in said county, subject to said tax, are assessed at the rate and payable at the time specified, the same shall be considered as duly and legally assessed; and said tax, duly levied thereon, and such order being duly recorded by the clerk of the circuit court, it shall be his duty to attach a copy of the same to each tax list of the State and county revenue, which he shall make out annually, and extend the said tax against all lands subject thereto, contained in such list, a separate column, to be provided for this purpose; and said board of levee inspectors shall have power, and it is hereby made their duty, at their annual meeting in May, to adjust the assessment and levy of said tax by hearing and deciding all questions relating to the improper assessment and taxation of any land, or the omission to assess and tax any land legally taxable under the provisions of this act, and make additions to, or deductions from, the taxes, as charged in such list upon any land or against any person whatsoever, and such correction or deduction may be made upon the affidavit of the person applying therefor, stating the ground upon which it is claimed, or any other information or evidence satisfactory to the board of inspectors, whose decision thereupon shall be final.

Section 16 makes it the duty of the sheriff to collect said levee taxes, and in the case of a failure of the owner of land so assessed to pay the tax due upon it, or within the time prescribed by the act, or which might be prescribed by the board, it was made the duty of the sheriff or collector to expose the lands to sale on the

first day of the next circuit court, and that if no person shall offer and bid the amount of taxes due on any lot, section, or other legal subdivision of land, the same should be struck off to, and purchased by, the treasurer of the board of inspectors, who shall receive a deed from the sheriff thereto as treasurer, and his successors in office, for the use and benefit of said levee fund.

And your orator would further show, that in accordance with the provisions of said act, but not at the next term after the passage thereof as required by said act, but at a special adjourned term begun and holden on the 24th day of February, 1857, the said county court of Chicot county proceeded to elect and appoint Charles W. Campbell, Daniel H. Sessions, Joshua M. Craig, Nathan Ross and Romulus Payne, whom your orator prays may be made defendants to this bill should it be deemed necessary, such levee inspectors, and that said Campbell, Sessions, Ross, Craig, and Payne afterwards organized as a board, and elected the said Charles W. Campbell as president of their board, and as such board proceeded to divide the county into levee districts as provided in said act, and to assess said levee tax; and on the 3d Monday in April, A. D. 1857, (which was in fact the first regular term of said court after the passage of said act,) the said board filed in said court a list of lands which they had assessed for such levee tax, to which was affixed a valuation of said lands. And thereupon it was ordered, by the said county court, that a tax of five-eighths of one per centum be levied and collected on the assessed value per acre of all the alluvial lands in said county, or that are or will be benefited by levees, and which are or shall be taxable for State revenue, according to the value of said lands as fixed by the assessment of said board of levee inspectors, and the collector for the county was authorized and required to make collection of said levee tax on or before the first day of December, 1857, and by said assessment so made by said board, and returned to the county court, all improved lands on the Mississippi river, and contiguous thereto, were valued at $30 per acre, and all unimproved lands throughout the county at ten dollars per acre.

Further complaining, showeth unto your honor, that the above described lands of your orator are included in said assessment; but your orator avers that they are wrongfully assessed, for if they are in any proper and legal sense alluvial lands, they are not benefited by levees within the meaning and intention of said act. Your orator submits that the benefit to lands contemplated by the legislature, and intended by the act, is an immediate and direct benefit by protection from overflow, by means of the levees, and not an indirect or incidental benefit; that levees are constructed to protect lands from overflow, and that protection is the benefit that the legislature intended that they should confer to subject the lands to said tax.

But your orator avers that the said lands are not, and have not been since the settlement of the country, and perhaps for centuries before, subject to overflow, and are not protected from high water or overflow by any levee, and need none for their protection. It may be true, and your orator does not deny, that since the construction of the levees on the Mississippi river, the accessibility from that river to them has been improved, but does not improve their fertility, nor make them dryer, or in any way more productive, is evident and clear.

It is true that by the 15th section of said act, it was made the duty of said board of levee inspectors, at their meeting in May, to adjust the assessment and levy of said tax, by hearing and deciding all questions relating to the improper assessment and taxation of any land, and that a correction of improper assessment was required to be made, upon the affidavit of person applying therefor, stating the grounds upon which it is claimed, or any other information or evidence satisfactory to the board; but your orator submits, that as said act makes the decision of the board upon such application final, your orator could have nothing like a fair, full and adequate remedy against such improper assessment, for inasmuch as said assessment was made by the said board, or by one of them, at least, who was to determine the justice of the application against the assessment, the matter would, to some extent, at least, be prejudiced against him, and should the decision be adverse to the owner, no appeal therefrom, or to any court or tribunal, is allowed him, and he is compelled to yield and surrender his property by the judgment of a tribunal unknown to the Constitution, and which is, as respects its powers and proceedings, above it and the laws of the land.

And your orator submits, that from that, as well as the additional consideration that said levee inspectors are to be elected by a privileged class of electors, that is to say, only by persons who reside on or cultivate alluvial lands in the county, subject to be assessed and taxed under the provisions of said act, and not by the constitutional electors of the State, and that it takes from the county court a portion of its jurisdiction in matters relating to county taxes, disbursements of money for county purposes, and the internal improvement and local concerns of the county, that said act, and the supplementary act thereto, are unconstitutional and void, and your orator is not bound by the law of the land to pay the same.

But now, so it is, may it please your honor, Martin R. P. Mathis, who is the sheriff and ex officio tax collector for said county, and whom your orator prays may be made a defendant to this bill, has advertised the said lands of your orator for sale, at the courthouse door in Lake Village, in said county of Chicot, on the 29th day of March, A. D. 1858, for said levee tax, your orator having paid all other taxes thereon for the year 1857, and is proceeding

to sell the same, to satisfy and pay said illegal, unconstitutional, oppressive, and unjust levee tax, and, unless restrained by your honor, will on said day sell the same; and your orator believes, should such sale be made in consequence of the great doubt respecting the constitutionality of said act, and the legality of said sale, the same would be sacrificed, and your orator be greatly injured and damaged thereby, and that unless restrained by your honor, that your orator will be put to great expense about the same, and in all likelihood be involved in expensive and costly lawsuits and litigation concerning the same.

Inasmuch, therefore, as your orator is remediless by the rules of the common law, and can only have relief in equity, may it please your honor to grant unto your orator the State's most gracious writ of injunction, issuing out of, &c., to be directed to the said Martin R. P. Mathis, to restrain him as such sheriff and ex-officio collector of taxes for said county, and his deputies, from selling, or suffering to sell the said described lands of your orator, or of any part thereof, to pay and satisfy said levee tax, but also the State's most gracious writ of subpœna, commanding the said Martin R. P. Mathis to be and appear before your honor, &c., in, &c., full, true, direct, and perfect answer make to all and singular the premises, and further to stand to, perform and abide such further order, direction, and decree therein, as to your honor shall seem meet. And your orator will ever pray, &c.

HARRISON & HOOKER,
Sol's for Compl't.

THE STATE OF ARKANSAS,
County of Chicot.

I, Charles *Montgomery*, do solemnly swear, that the facts and allegations set forth in the foregoing bill, so far as stated on his knowledge, is true, and so far as stated on the knowledge of others he believes to be true, so help him God.

CHARLES McDERMOTT.

Sworn to and subscribed before me, March 27th, '58.

THEODORICK F. SORRELLS,
Circuit Judge.

Order for Injunction.

Having examined the within bill of complaint, and being satisfied that the complainant is entitled to the relief prayed for, the clerk of the circuit court of Chicot county, Arkansas, is hereby authorized and required to issue a writ of injunction, according to the prayer of the within bill.

I hereby approve N. B. Hooker as sufficient security upon the in-

junction bond, to be filed with the clerk of said court, before said writ shall be issued by said clerk.

Given under my hand and seal, this the 29th day of March, A. D. 1858.

THEODORICK F. SORRELLS, *Judge*.

Endorsed: Filed March 29th, 1858.
Attest: S. N. CAUGHEY, *Cl'k*.
By S. L. DORSEY, *D. C*.

Injunction Bond.

Bond for Injunction.

Know all men by these presents, that I, N. B. Hooker, held and firmly bound unto the county of Chicot, in the State of Arkansas, in the sum of two hundred dollars, the payment of which well and truly to be made I bind myself, my heirs and assigns, firmly by these presents, and sealed with my seal, this 27th day of March, A. D. 1858.

The condition of the above obligation is such, that whereas the said Charles C. McDermott has prayed and obtained *and obtained* an injunction enjoining Martin R. P. Mathis, sheriff of Chicot county, from selling the lands mentioned in his said bill:

Now, therefore, if upon the final hearing in said cause the said injunction be made perpetual, then this obligation to be void, otherwise to remain in full force and virtue.

N. B. HOOKER. [SEAL.]

Endorsed: Filed March 29th, 1858.
S. N. CAUGHEY, *Cl'k*.

Order 1st. Entered from Chancery Minutes, March 30th, A. D. 1858, 2d day.

CHARLES MCDERMOTT, Complainant,
vs.
MARTIN R. P. MATHIS, Defendant.

The complainants in the above cause having heretofore, on the 27th day of March, A. D. 1858, presented their several bills for an injunction to restrain the sheriff aforesaid from selling certain lands therein named for non-payment of levee taxes thereon, and the court having on inspection and consideration thereof made the order as therein and thereby prayed for, and the writ having issued under the certificate and seal of said court, with a full description of said lands, it is on their motion ordered that their causes stand on the docket of this court, and that sheriff is hereby ordered to withhold said lands from sale, and not to assess the same for taxes, until the further order of this court.

Order 2d. Extract from Chancery Minutes, April 1st, 1858, 4th day.

CHARLES MCDERMOT, Compl't,
vs.
M. R. P. MATHIS, as Sheriff, &c., Def't.

Now, on this day come said parties, by their solicitors, and this cause is ordered by the court to stand continued until the next term of this court, with leave for said defendant to plead, answer, or demur to complainants' bill of complaint, at the said term of this court next ensuing.

Final Order. Extract of Chancery Minutes, October 7th, 1858, 4th day.

Agreement of Counsel.

CHARLES MCDERMOTT, Compl't,
vs.
MARTIN R. P. MATHIS, as Sheriff of Chicot county, Def't.

This day came the complainant and defendant, by solicitors, and by agreement and consent the answer of the defendant in the cause of Edmund Mc*Gee*, No. 26, and exhibits thereto, are to be taken as an answer in this cause, and replication thereto in short, on the record by consent; and by consent this cause came on for final hearing on bill, said answer, exhibits, and the agreement of facts filed in said cause No. 26; and exhibits *was* read in this , and made applicable hereto, and was argued by counsel.

Decree.

And whereupon it is ordered, adjudged, and decreed by the court that the injunction granted in this cause be dissolved, and the bill dismissed for want of equity, and that defendant recover from complainant all his costs in this behalf expended.

From which decree the said complainant prayed an appeal to the Supreme Court, and the affidavit required by law being waived, such appeal is granted, and the same by consent is to operate as a supersedeas without security.

STATE OF ARKANSAS,
County of Chicot, ss.

I, Benjamin F. Stephenson, clerk of the circuit court in and for the said county of Chicot, and State of Arkansas, do hereby certify that the foregoing eighteen pages, and this page, do contain a true and perfect transcript of the records and proceedings in the suit of Charles McDermott vs. R. P. Mathis, sheriff of Chicot county, Arkansas, on the chancery side thereof, as the same appears from the records and files of my office.

In testimony whereof I have hereunto set my hand as such clerk, and affixed the seal of said court, at office in Lake Village, this the 16th day of December, A. D. 1858.

[SEAL.]

B. F. STEPHENSON, *Clerk*.

And afterwards, to wit, at a supreme court of said State, begun and holden on the first Monday in January, A. D. 1859, and on the 6th day were the following proceedings, to wit:

Agreement of Counsel.

At this day come said appellant and appellee, by their solicitors, and their agreement of record filed in the case of James H. Wilson vs. Martin R. P. Mathis is also filed in this case. And thereupon, on motion of said appellant, it is ordered that his assignment of errors be filed, and the same is filed.

Which said agreement is as follows:

Whereas Edmund McGehee, James H. Wilson, John J. Jackson & Co., Charles McDermott, Charles C. McDermott, James S. Montgomery, and William E. Bowling, filed their several bills of complaint against Martin R. P. Mathis, sheriff of Chicot county, restraining the collection of levee taxes on certain lands by them owned in said county, and said Mathis appeared and answered the bill filed by McGehee, and an agreement of counsel was drawn up and signed and filed in said cause stating the facts relative to the matters and things arising in said suit, and by agreement of counsel, entered of record in the Chicot circuit court, said answer of Mathis and the agreement as to the facts, filed in the case of McGehee vs. Mathis, were to be taken and stand as the answer of Mathis and the facts in the other cases; and said causes were heard on said answers and agreement of facts, and the bills severally dismissed and injunctions dissolved; and said complainants appealed to this court, and said causes are now on the docket of this court, numbered from 263, 264, 278, 279, 280, 281, and 284, inclusive; but the transcripts in the said causes, except in the one of McGehee vs. Mathis, do not contain the answer of said Mathis and said agreement of facts: Now we, as counsel for said parties, do hereby agree and consent that said answer and agreed state of facts in No. 264 may be taken and considered by the court as portions of the transcripts in the other of said causes, viz: 263, 278, 279, 280, 281, and 284, and hereby waive the necessity of having the same formally incorporated in said transcripts.

GARLAND & RANDOLPH,
For McGehee, and John J. Jackson & Co.

And WM. M. HARRISON and GARLAND & RANDOLPH,
For McDermotts, Bowling, and Montgomery.

S. H. HEMPSTEAD,
Solicitor for Martin R. P. Mathis.

And said assignment of errors is as follows:

Ass't of Errors.

Comes the said appellant by attorney, and says, that there is error in the record and proceedings had in this cause, in this, that is to say:

1st. The court erred in refusing to make the injunction perpetual and in dissolving the same.

2d. In dismissing the appellant's bill and refusing to grant the relief therein prayed; and,

3d. The decree is in favor of the appellee when it should be in favor of the appellant; and this, he, the said appellant, is ready to verify, wherefore he prays judgment, &c.

HARRISON & HOOKER.

And afterwards, to wit, on the 12th day of November, A. D. 1859, at a term of said court begun on the first Monday in October, 1859, to which term this cause was continued by operation of law, were the following proceedings:

Joinder.

At this day comes said appellee, by his solicitor, and on motion it is ordered that his joinder in errors be filed; and thereupon the same is filed.

And at the same time comes said appellant, by his solicitor, and this cause is submitted on briefs, and by the court taken under advisement.

Which said joinder in errors is as follows:

And the said appellee, by his solicitor, comes into this honorable court and says that there is no error either in the record and proceedings aforesaid, or in rendering the decree aforesaid; and he prays that the court here may proceed to examine as well the record and proceedings aforesaid as the matters above assigned for error; and that the decree aforesaid, in form aforesaid, may in all things be affirmed, with damages and costs.

And afterwards, to wit, on the said 4th day of February, A. D. 1860, were the following proceedings:

This cause came on to be heard upon the transcript of the record of the circuit court of Chicot county in chancery, and was argued in this court by the solicitors of the parties, on consideration whereof it is the opinion of the court that there is no error in the proceedings and decree of said circuit court in chancery in this cause:

It is therefore ordered and decreed that the decree of said circuit court in chancery in this cause be, and the same is hereby, in all things affirmed, with costs.

It is further ordered and decreed that said appellee recover of

said appellant all his costs in this court in this cause expended, and have execution thereof.

And afterwards, to wit, on the 10th day of February, A. D. 1860, came said appellant, by his solicitor, and presented a writ of error issued from the circuit court of the United States for the eastern district of Arkansas, and filed therewith an appeal bond, in the following words:

Bond in Error.

Know all men by these presents that we, Augustus H. Garland as principal, and Gordon N. Peay as security, are held and firmly bound unto the said Martin R. P. Mathis in the sum of one hundred dollars, to be paid to the said Mathis, and for the payment whereof well and truly to be made, we bind ourselves, and our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Signed and sealed by us respectively, and dated February 7th, 1860.

Conditioned, that whereas the above named Charles McDermott has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered by the supreme court of the State ofArkansas, in the suit there pending on appeal in chancery from the decree of the circuit court of the county of Chicot, in that State, in which suit the said Charles McDermott was appellant: Now, therefore, the condition of this obligation is such, that if the above named McDermott shall prosecute his said writ of error to effect, and answer all costs if he shall fail to make good his plea, then this obligation shall become void; else to remain in full force and virtue.

A. H. GARLAND. [SEAL.]
GORDON N. PEAY. [SEAL.]

STATE OF ARKANSAS.

Having fixed the amount of the foregoing bond at the sum of one hundred dollars, and the sureties therein being personally well known to me, and being by me considered sufficient, I do hereby approve the said bond as sufficient, the said writ of error being lodged in the office of the clerk of the supreme court of the State of Arkansas, on this 10th day of February, A. D. 1860.

E. H. ENGLISH,
Chief Justice of the Supreme Court of Arkansas.

In testimony that the foregoing 20 pages contain a full, true, and complete transcript of the record of proceedings of said supreme court in said cause, except the brief of counsel and opinion of the court—

I, Luke E. Barber, clerk of said supreme court, here to set my hand and affix the seal of said court at my office, [SEAL.] in the city of Little Rock, this 28th day of February, A. D. 1860.

L. E. BARBER, *Clerk.*

UNITED STATES OF AMERICA, *ss.*

The President of the United States of America to the Judge of the Supreme Court of the State of Arkansas, greeting:

Because in the record and proceedings, as also in the rendition of a decree in a certain suit upon an appeal in chancery from the decree of the circuit court of the county of Chicot, in the State of Arkansas, which is in the said supreme court of the State of Arkansas, before you, between Charles McDermott, appellant, and Martin R. P. Mathis, as sheriff, and appellee, a manifest error hath happened, to the great damage of the said Charles McDermott, as by his complaint it appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in said Supreme Court to be then and there held, that the decree and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, this 7th day of February, in the year of our Lord one thousand eight hundred and sixty, and of the independence of the United States the eighty-fourth year.

[L. S.] Attest: A. H. RUTHERFORD,
Clerk of the Circuit Court of the United States for the Eastern District of Arkansas.

The within writ of error is allowed.

E. H. ENGLISH,
Ch. J. Sup. Ct. Ark.

Feb. 10th, 1860.

STATE OF ARKANSAS,
In the Supreme Court, ss.

I, Luke E. Barber, clerk of the supreme court of the State of Arkansas, hereby certify, that in obedience to the mandate of the within writ of error, and the allowance thereof, I have made out and

certified a full, true, and complete transcript of the record of proceedings in the case therein stated, except as in the certificate thereof is excepted, which said transcript is hereto attached.

In testimony whereof, I hereto set my hand as clerk of said supreme court, and affix the seal of said court at [SEAL.] my office, in the city of Little Rock, this 28th day of February, A. D. 1860.

L. E. BARBER, *Clerk.*

UNITED STATES OF AMERICA, *ss.*

To Martin R. P. Mathis, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the supreme court of Arkansas, wherein Charles McDermot is plaintiff, and you, as sheriff and ex-officio assessor and collector of Chicot county, in the State of Arkansas, are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable E. H. English, chief justice of the supreme court of Arkansas, this February 10th, 1860.

E. H. ENGLISH,
Chief Justice of the Supreme Court of Ark's.

I acknowledge service of the foregoing citation, this 10th of February, 1860, at Little Rock, Ark's.

S. H. HEMPSTEAD,
Sol. for Mathis.

Filed 30 June, 1860.

SUPREME COURT OF THE UNITED STATES.

No. 195.—DECEMBER TERM, 1860.

CHARLES McDERMOTT, PLAINTIFF,

vs.

MARTIN R. P. MATHIS, DEFENDANT.

ERROR TO THE SUPREME COURT OF ARKANSAS.

Brief for Plaintiff in Error.

The argument for McGehee, in No. 189, applies to much of this cause, and I ask the court to consider it as if filed in due form here. The court will see, from the *7th item* in the agreed statement in McGehee's case, six other cases are mentioned, all of which were decided as that, and error is brought in all of them, and they now stand here for adjudication. They are, *Jackson & Co.* vs. *Mathis; Montgomery* vs. *Mathis; Bonling* vs. *Mathis; Wilson* vs. *Mathis;* Charles C. McDermott vs. *Mathis*; and this suit. On the argument in McGehee's case, and the one in this, all the cases will be decided.

In the *8th item* of the agreed statement already alluded to, it appears that the lands named in the suits of the two McDermotts, Bonling and Montgomery, *are not subject to overflow from the Mississippi river,* NOR PROTECTED BY LEVEES. This levee law, *p.* 61, *sec.* 14, *acts of Arkansas*, 1856 *and* '7, expressly states that the tax shall be levied on all alluvial lands in the county, *that would be benefited by levees*, &c. What are we to understand by benefit? It is a proximate and immediate benefit. The law did not mean

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remote and consequential benefit. There would be no limit to the word, if it is determined to signify this. By this means, the high lands of the State, miles distant from the levee and its influences, might be taxed to support it. It means this: that such lands as would be overflowed if the levee be not constructed, shall be taxed. We are not left to speculate on the thousand things this levee might accomplish remotely; not at all. But are these lands kept free from overflow by means of the levee? This is the point. The intention of the legislature was to devise means by which all the lands subject to overflow in Chicot county might be protected therefrom. This interpretation makes the law reasonable. Any benefit, then, claimed here to lands not protected *immediately* by such levees, is too far off, too remote, and an inquiry into them is of no avail. *Sedgwick on Measure of Damages*, 69-76; 2*d Parsons on Cont.* 454, 463. All the evidence on this point is embodied in the 8th item of the argument of counsel; and this, I take it, completely relieves the lands in the four cases named from taxation. The question is simply one arising on the construction of the act. It means something or nothing. If nothing, there is an end of the whole matter. If it means anything, it must mean such lands as the levee would shield from overflow. The lands in the four cases named are not protected by the levee. If not protected, how are they *benefited?* I submit, by the very face of the record, there is no shadow of doubt left but that these lands are exempt, as they are not protected by the levee for which they were taxed.

Respectfully,

A. H. GARLAND,
Counsel for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

No. 189.—December Term, 1860.

EDMUND McGEHEE, PLAINTIFF IN ERROR,

vs.

MARTIN R. P. MATHIS, SHERIFF, &c., DEFENDANT IN ERROR.

ERROR TO THE SUPREME COURT OF ARKANSAS.

Argument for Defendant in Error.

Edmund McGehee, the plaintiff in error, on the 8th of March, 1858, filed his bill in chancery, in the Chicot circuit court, Arkansas, against Martin R. P. Mathis, as and in his capacity of sheriff and collector of the taxes of the county of Chicot, alleging that he, the complainant, during the years 1855, 1856, and 1857, had entered and located with scrip, which had been issued upon levee contracts, made prior to the 11th day of January, 1855, a large quantity of swamp lands, subject to sale by the State authorities, situate in Chicot county, Arkansas, and which were particularly specified by sections, townships, and ranges, and amounted in the aggregate to over ninety thousand acres; and the bill insisted that these lands, having been entered with such scrip, were exempt from all taxation, whatever, for the space of ten years, under the 14th section of the act of the 6th of January, 1851, and the repeal of which, by the act of the 11th of January, 1855, impaired the obligation of contracts, and was a fraud upon his rights; that nevertheless the State had, by law, provided for the taxation of said lands, and especially by an act passed on the 7th of January, 1857, had, in violation of the Constitution of the United States, authorized a special levee tax to be levied in that county, and

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under which no lands can be assessed at less than ten dollars per acre; and that the levee tax on these lands, under that law, a year is $4,744 45, and for ten years will be $47,444 50, which is the true amount in controversy; and that the sheriff was proceeding to assess and collect the same, and the bill prayed that he might be restrained from collecting any taxes on the said lands, until ten years had expired, from the date of entry; that the act of the 11th of January, 1855, be declared to be void, as impairing the obligation of contracts, and that the special levee tax law be declared unconstitutional and void.

An injunction was granted and writ issued, restraining the sheriff from listing or collecting any taxes on said lands, until ten years from the date of their entry, and the sheriff and collector ceased all proceedings accordingly.

At the October term, 1858, the defendant answered the bill, stating that the county court having stricken out the State and county taxes from the assessment list, the levee tax only remained in controversy—that these, among other lands, had been duly listed and assessed for the levee tax of Chicot county, for 1857, under the act for that purpose; that one-fourth of one per cent. had been fixed as that tax, on all alluvial lands in the county that would be benefited by levees; that the list, with the warrant thereto attached, had come to his hands as such sheriff, in due form of law; that the complainant refusing to pay the said levee tax, he advertised the lands, and should have sold them, had he not been restrained by injunction for the said levee tax.

And he averred, that under the levee act the levee inspectors were duly elected, and a board organized, officers elected, the assessment list regularly made out and perfected, and all proceedings had strictly in accordance with the act, as would appear, in part, from exhibits to the answer; and he insisted that the act was valid and obligatory, did not impair the obligation of any contract, did not conflict with the constitution of the State or the United States, and was only the lawful exercise of the sovereign right of taxation reserved to government. And he specially plead and insisted that there was no equity in the bill—that the court had no jurisdiction on the equity side by injunction or decree, to restrain the collection of a tax, levied under the authority of law, and on which defences he would rely at the hearing, and he finally prayed for a dissolution of the injunction.

Replication was filed to the answer, and to expedite the cause and others of like kind, and to prevent the record from being encumbered by proof of matters about which there was not intended to be, and was not, in fact, any dispute or controversy, the following agreement was entered into by the solicitors representing the several parties, in writing, and filed, and became part of the record in the cause, viz:

1. The lands mentioned in the bill, situate in Chicot county, are confirmed swamp lands, and were purchased by the complainant, with scrip, issued upon levee contracts made prior to the 11th of January, 1855, but were *actually purchased and entered after the passage of that act.* They are what are known as alluvial lands, and are owned by McGehee, who is a non-resident, and a citizen of the State of Tennessee.

2. Under the act of 11th January, 1855, the said lands were furnished to the defendant, as assessor of Chicot county, by the auditor, in due form of law, and by such assessor regularly assessed for the year 1857, for State and county taxes, and those taxes being stricken out by the county court, leaves only the levee tax as the subject-matter of controversy.

3. Under the act of the 7th of January, 1857, concerning levees in Chicot county, levee inspectors were elected, a levee board constituted, meetings held, the county divided into levee districts, the assessment lists made out and returned, and passed on by the county court, the valuation and tax fixed, as appears by the exhibits to the answer, and the levee tax-book delivered to the defendant as sheriff, all in due time and according to that act. The levee tax, thus assessed, being unpaid, publication and advertisement was made, in strict accordance with that act, and the sale prevented by the injunction.

4. The steps taken and proceedings had, have been in accordance with said act; but the complainant insists that the act is unconstitutional, and that said lands are not taxable for levee purposes, the defendant affirming that they are.

5. The levee tax assessed on said lands amounts to the sum named in the bill.

6. Replication to the answer, in short, and the case to be heard, by consent at the present term, on bill, answer, exhibits, replication and this agreement.

7. If the bill is dismissed, the tax and costs may be decreed. Appeals to be allowed without affidavit and without security.

The answer and agreement were made applicable to six other cases by different complaints against the same defendant, to be heard in the same way, and appeals to be had in the same manner.

On the 7th of October, 1858, the cause came on for final hearing, and was argued by counsel, and the court [Hon. John C. Murray] being of opinion that there was no equity in the bill, the same was dismissed, and the injunction dissolved, and costs adjudged against the complainant.

From which decree he appealed. And like decrees having been pronounced in the six other cases, the complainants in those also appealed.

The supreme court of Arkansas affirmed the decrees in all the

cases, holding that the act of the 7th of January, 1857, authorizing the levee tax, did not impair the obligation of any contract, and that the lands named in the bills were subject to that tax.

Those cases, seven in number, have been brought into this court by writs of error, are numbered 189, 190, 191, 192, 193, 194, 195, are all alike, and may be considered together, and this brief applies to them all.

As far as the bill complains of the act of 1857, for a supposed conflict with the constitution of Arkansas, I need, on that head, give myself no concern, because this court, if I rightly understand its jurisdiction, has no power to inquire into it. For, under the 25th section of the Judiciary act of 1789, and the uniform construction placed upon it, the revising power of this court, as to cases brought here from a State court, only extend to those: 1st, where the validity of a treaty or statute of, or an authority exercised under, the United States is drawn in question, and the decision is against the validity thereof; 2d, where the validity of a statute of, or authority exercised under, any State is drawn in question on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; and 3d, where the construction of any clause of the Constitution, or of a treaty or statute of, or commission held under, the United States is drawn in question, and the decision is against the title, right, privilege, or exemption specially set up or claimed by either party under the same. And no error can be assigned or regarded as a ground of reversal in any such case, than such as appears upon the face of the record, and immediately respects the before mentioned questions of validity or construction of the Constitution, treaties, statutes, commissions, or authorities in dispute. And it must appear that some one of these questions did arise in the court below, and that a decision was actually made thereon; and if both of these do not appear on the record, the appellate jurisdiction fails.

Crowell vs. *Randell*, 10 *Peters*, 368.

The only question to be here decided is the validity of the special levee law of the 7th of January, 1857, and whether it impaired the obligation of a contract; and if it did not, the case is at an end, and the judgment of the Arkansas court must be affirmed.

This question has been decided by the supreme court of Arkansas, in *The State* vs. *County Court of Crittenden County*, 19 *Ark.*, 375. It was held in that case that swamp and overflowed lands sold by the State, under the provisions of the act of the 6th of January, 1851, while the 14th section thereof was in force, were, by contract between the State and purchaser, exempt from general taxation for ten years, unless sooner reclaimed, and that the exemption began at *the date of the purchase from the State*—in other

words, that the terms of the sale must be regarded as the controlling fact on which the exemption was to be predicated, and that if a sale was made when the 14th section was in force, the exemption applied; but if *afterwards*, such lands were taxable for all purposes, like any other lands.

This decision is not only correct as to that principle, but in view of the law, no other could be reasonably maintained; for it is swamp and overflowed land that is exempted from taxation by the 14th section of the act of January 6th, 1851, and nothing else; and by that section, no contract could spring into being until the land had been purchased from the State. Until then, there was nothing upon which the exemption could operate; and when we consider that exemptions of property from taxation are always to be construed strictly, this ought to be decisive of the question.

To go, however, a little further into the matter. The act of 1851 authorized the swamp land commissioners to let out the making of levees and drains by contract, to responsible persons and the lowest bidder, at a stipulated price per cubic yard; and payment to be made in the lands reclaimed, or in the proceeds of the sale thereof, at the price previously fixed thereon by the commissioners, and the contractor had the privilege to demand and receive in payment the land reclaimed in kind at the price fixed by the commissioners, or to receive land scrip representing quarter section tracts; and which scrip was transferable by assignment, and might be located upon any of the unselected portion of the swamp and overflowed land. And when any contractor had selected land in payment of his work, or having received scrip, had located that upon unselected land, he was required to furnish the numbers of such land to the commissioners, and upon their certificate, the governor is directed to execute a deed to the contractor or his assignee in due form of law.

Now from these provisions, it is plain that the contractor might do two things: first, take land in kind; or second, take land scrip, and locate the same, as the law then stood, upon any unselected swamp land in the State of Arkansas; and from official reports to the legislature, it appears that large quantities of lands were taken up on Red river—nearly all the swamp lands there, to pay for the levee work fair and fraudulent, done or supposed to have been done upon the Mississippi. Bad, however, as it was, yet it went no further than to say that whoever selected and took up swamp lands while the 14th section was in force, should not be obliged to pay taxes on them for ten years from the date of entry. It did not say because a contractor held scrip that he might continue to hold it as long as he pleased, and finally locate it on swamp land, and then have the land exempted from taxation for ten years. It did not reach any point like that; although the law in all seriousness was

enough to induce every one to feel that a great and munificent gift from our federal parent was to be squandered upon land companies and land speculators, leaving to poor Arkansas, only the odium of the system.

I concede that lands purchased before the repeal of the 14th section of the act of 1851, were not taxable for public purposes for ten years, because the Arkansas court said so in 19 *Ark.* 360; and that is the law of that case, and, it may be, should be followed in others, to avoid those distressing evils which follow fluctuations in judicial decisions. *Stare decisis et non quieta movere*, is a sound maxim, and commends itself to our adoption in ordinary cases, but must be admitted with caution in grave questions touching the sovereign powers of government. My individual opinion, that the 14th section was not a contract, and if it was, that the legislature was incompetent to make it, remains unchainged, and has been strengthened by time and subsequent reflection. But I am sensible that an individual opinion must yield to a solemn decision of the court.

It is proper for me to protest against that decision being extended a single hair's breadth; and especially protest against the idea that the claims of the plaintiffs in error in the cases now before this court can receive justly any benefit from that decision. It is against them.

That court, in the case we have under review, (*McGehee* vs. *Mathis, as sheriff*, 21 *Ark.* 40, 57,) thus referred to that, and thus treated the question: "It is insisted, for the appellant, that although his lands were not actually purchased until after the passage of the repealing act of 11th of January, 1855; yet, being purchased with scrip, which issued on levee contracts made prior to the passage of that act, they were, by contract between him and the State, brought within the exemption provided for by the 14th section of the act of the 6th of January, 1851. We do not think so. The 14th section of the act underwent discussion, and was construed by this court, in *The State* vs. *County Court of Crittenden County*, 19 *Ark.*, 360. In that case the court held that the 14th section was, in legal effect, an offer on the part of the State, to sell her swamp lands, in which she proposed, as an inducement to purchasers, to exempt them from taxation for ten years, or until they were reclaimed; that such of them as were sold under the provisions of the act while the 14th section thereof was in force, were, by contract between the State and the purchaser, exempt from taxation; and that the period of the exemption began at the date of the purchase from the State and continued for ten years, if the lands were not sooner reclaimed; and if they were, ceased upon their reclamation; and in no event continued longer than ten years, whether reclaimed or not.

"The court did not decide that the 14th section of the act of 1851 was irrepealable; but did decide that it could not be repealed so as

to affect the exemption in favor of those who had purchased swamp lands prior to the passage of the repealing act, and in this was well warranted on principle and by authority.

"In the offer of the State the exemption was held out as an inducement to purchasers and contractors to purchase, or, in the language of the act, 'to take up' the *lands*, and not as an inducement to contractors to take *scrip*. Until the offer was accepted, or, in other words, until a purchase was made, there was no contract. Did the State not have a right to withdraw her offer? Was she bound to wait, in order that the holders of the scrip, after speculation had ceased to be desirable, might have an opportunity to secure the exemption? The State was under no obligation, legal or moral, to do so. According to the plain provisions of the act of 1851, the contractor might take land in kind or take land scrip. It was left to his choice to do either. Various considerations might, and doubtless in many instances did, influence the contractor to take scrip instead of land in kind. If he took land it was to be at the price per acre previously fixed by the commissioners, and he was confirmed in his selection to such lands only as were reclaimed, however undesirable they might be. But if he took scrip, it could, as the law then was, be floated, and with it the contractor could purchase unselected swamp land, lying anywhere within the limits of the swamp land grant, at the same price per acre, even though the land thus purchased should be intrinsically more valuable than those which had been reclaimed. Again: the lands being wild and productive of no present income, the contractor might not be willing to invest the proceeds of his labor in them, and wait indefinitely for the fruits of the investment; whereas the scrip being assignable, he could, by receiving and selling it, realize its then present cash value. To take land in kind was one thing, and to take scrip was quite another. If the contractor took land, he became a purchaser, and acquired the exemption. But if he took scrip, he did not become a purchaser, and did not acquire the exemption. To hold that the State, in the offer to sell her swamp lands, as expressed in the 14th section of the act of 1851, proposed as an inducement to contractors to take *scrip*, that the lands which they might afterwards purchase with it should be exempt from taxation, would not only do violence to a settled rule of construction, which is that privileges and exemptions granted by the State shall be strictly construed, and that nothing shall be held to have passed except what is clearly and explicitly granted, (*State vs. County Court, &c., supra,*) but would also be at war with what seems to us to be the plain reading of the statute."

I have copied thus largely from the very able opinion of the court, to show the strong and impregnable grounds upon which the question has been placed in this particular case; and moreover,

to show what was the scope and extent of the decision in 19 Ark., 360, and upon which the learned counsel for the plaintiffs seemed to rely, as sustaining their pretensions. I beg leave to ask for the whole opinion the careful consideration which its ability merits.

The simple truth is that the 14th section was a gratuity or bounty offered to a small part of the community at the expense of the rest; and while it is true that those who availed themselves of it, by purchasing lands when it was in force, must have its benefits, yet those who did not can have no claim of that sort at all. They, at least, must take the law as they find it when they become the owners of swamp land by purchase from the State. They are not deceived. No faith plighted to them has been broken. They are only called upon to contribute their mite to the support of a government which protects them and their property.

The 14th section was not irrepealable. It was not immortal, and was as subject to change or modification as any other part of the act of 1851, by way of providing a rule for the future, but not to operate upon the past.

The power of repeal must be conceded, since one legislature cannot bind another. The succeeding legislature is as competent to repeal a law as the previous one was to enact it, and the only check upon this power is, that executed contracts cannot be affected, nor perfected grants undone.

By an act approved 10th January, 1853, [*Acts* 852, *p.* 107,] it was made the duty of the assessor of each county diligently to inquire and ascertain what swamp lands sold by the State have have been protected from overflow by levees or by other means reclaimed, and to assess the same for taxation.

Again, by act approved 12 January, 1853, [sec. 33 and 34,] the swamp land commissioners on the first Monday of January of each year were required to transmit to the auditor an accurate list of all swamp and overflowed lands reclaimed, in order that the same might be taxed according to the 14th section of the act of 1851. And the auditor was required to furnish a copy of such list to the sheriff of each county, and the sheriff was commanded to assess such lands as in other cases. *Acts* 1852, *p.* 169.

Then comes the act of 11th of January, 1855, [*Acts* 1854, *p.* 120,] repealing the 14th section of the act of 1851, and declaring that all swamp and overflowed lands sold or located should be subject to taxation in the same manner as other lands were taxed according to existing laws of the State. And the auditor was required to furnish descriptive lists of such lands to the assessors of the several counties, and they were required to list and assess them for taxation for each year succeeding the date of the sale or location in the same manner as other taxable property was required to be listed, and assessed for taxation.

All these provisions indicated an earnest determination to restore

the swamp lands to the mass of taxable property, and it is fit that the policy should be sustained.

But supposing the 14th section had not been repealed at all, there is still a view to be taken of it which would make assessments for special purposes legal. It is, that the exemption in that section must be construed in reference to State and ordinary county taxes alone, and should not be held to embrace special or local assessments. I will not say that assessments for local objects or purposes might not have been exempted, but merely that they were not; because every exemption of property from taxation must be strictly received, and terms of ambiguity in the grant must operate against the grantee, and in favor of the public. In other words, nothing passes which is not clearly and explicitly granted. 19 *Ark.*, 366; 4 *Peters*, 561; 16 *How.*, 435.

It will be observed, that the 14th section of the act of 1851 uses the term "taxation;" exempts lands taken up from taxation. This term does not embrace special local assessments where the fund raised is expended for the improvement of the property taxed. Legislative sanction of such assessments is ordinarily procured by the action of the parties interested, and are widely distinguishable from taxation for governmental or public purposes.

In *The State* vs. *New Orleans Nav. Co.*, 11 *Martin*, 309, Judge Martin says: "The words impost, tax or duty, must be confined to the idea which they commonly and ordinarily present to the mind—exactions to fill the public coffers, for the payment of the debt and the promotion of the general welfare of the country, not to a contribution provided to defray the expenses of building bridges, erecting causeways, or removing obstructions in a watercourse, to be paid by such individuals only who enjoy the advantages resulting from such labor and expense."

The ordinance of 1787 declared that "all navigable waters leading into the St. Lawrence and Mississippi, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the territory as the citizens of the United States, or those of any other State that may be admitted into the Confederacy, without any *impost, tax, or duty* therefor." This provision was literally copied in the act of Congress of March 2, 1805, and it was held in the case from which Judge Martin's remarks are quoted, that the charter of the New Orleans Navigation Company, which authorized a tax to be levied on vessels navigating the Mississippi, for the purpose of raising a fund to be applied to the *improvement of that navigation*, was not a tax or impost or duty within the meaning of the act of Congress, or the ordinance from which it was copied.

Under a law of Louisiana, the owner of land on the Mississippi river was required to construct levees or embankments; and if the owner failed to construct or keep in repair his portion of the levee,

to show what was the scope and extent of the decision in 19 Ark., 360, and upon which the learned counsel for the plaintiffs seemed to rely, as sustaining their pretensions. I beg leave to ask for the whole opinion the careful consideration which its ability merits.

The simple truth is that the 14th section was a gratuity or bounty offered to a small part of the community at the expense of the rest; and while it is true that those who availed themselves of it, by purchasing lands when it was in force, must have its benefits, yet those who did not can have no claim of that sort at all. They, at least, must take the law as they find it when they become the owners of swamp land by purchase from the State. They are not deceived. No faith plighted to them has been broken. They are only called upon to contribute their mite to the support of a government which protects them and their property.

The 14th section was not irrepealable. It was not immortal, and was as subject to change or modification as any other part of the act of 1851, by way of providing a rule for the future, but not to operate upon the past.

The power of repeal must be conceded, since one legislature cannot bind another. The succeeding legislature is as competent to repeal a law as the previous one was to enact it, and the only check upon this power is, that executed contracts cannot be affected, nor perfected grants undone.

By an act approved 10th January, 1853, [*Acts* 852, *p.* 107,] it was made the duty of the assessor of each county diligently to inquire and ascertain what swamp lands sold by the State have have been protected from overflow by levees or by other means reclaimed, and to assess the same for taxation.

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All these provisions indicated an earnest determination to restore

the swamp lands to the mass of taxable property, and it is fit that the policy should be sustained.

But supposing the 14th section had not been repealed at all, there is still a view to be taken of it which would make assessments for special purposes legal. It is, that the exemption in that section must be construed in reference to State and ordinary county taxes alone, and should not be held to embrace special or local assessments. I will not say that assessments for local objects or purposes might not have been exempted, but merely that they were not; because every exemption of property from taxation must be strictly received, and terms of ambiguity in the grant must operate against the grantee, and in favor of the public. In other words, nothing passes which is not clearly and explicitly granted. 19 *Ark.*, 366; 4 *Peters*, 561; 16 *How.*, 435.

It will be observed, that the 14th section of the act of 1851 uses the term "taxation;" exempts lands taken up from taxation. This term does not embrace special local assessments where the fund raised is expended for the improvement of the property taxed. Legislative sanction of such assessments is ordinarily procured by the action of the parties interested, and are widely distinguishable from taxation for governmental or public purposes.

In *The State* vs. *New Orleans Nav. Co.*, 11 *Martin*, 309, Judge Martin says: "The words impost, tax or duty, must be confined to the idea which they commonly and ordinarily present to the mind—exactions to fill the public coffers, for the payment of the debt and the promotion of the general welfare of the country, not to a contribution provided to defray the expenses of building bridges, erecting causeways, or removing obstructions in a watercourse, to be paid by such individuals only who enjoy the advantages resulting from such labor and expense."

The ordinance of 1787 declared that "all navigable waters leading into the St. Lawrence and Mississippi, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the territory as the citizens of the United States, or those of any other State that may be admitted into the Confederacy, without any *impost, tax, or duty* therefor." This provision was literally copied in the act of Congress of March 2, 1805, and it was held in the case from which Judge Martin's remarks are quoted, that the charter of the New Orleans Navigation Company, which authorized a tax to be levied on vessels navigating the Mississippi, for the purpose of raising a fund to be applied to the *improvement of that navigation*, was not a tax or impost or duty within the meaning of the act of Congress, or the ordinance from which it was copied.

Under a law of Louisiana, the owner of land on the Mississippi river was required to construct levees or embankments; and if the owner failed to construct or keep in repair his portion of the levee,

the district inspector had the levee built or repaired, and assessed the cost upon the land of the delinquent proprietor. And in *Crowley* vs. *Copley*, 2 *Louisiana Ann. R.*, 329, this assessment was held not to be within the act of Congress, which exempted from State taxation all public lands of the United States for five years after sale by the Government.

In *the matter of the mayor of New York*, 11 *Johns. R.*, 80, certain churches insisted that their lots were exempt from assessments for opening, enlarging, or otherwise improving streets in the city of New York, made pursuant to an act of the legislature, passed in 1813. The court said, "These assessments are intended and directed to be made upon the owners of lands and lots who may receive 'benefit and advantage' by the improvement. The exemption granted by the act of 1801 was in the general act for the *assessment and collection of taxes;* and the provisions of that act refer to general and public taxes to be assessed and collected for the benefit of the town, county, or State at *large*. The words of the exemption are, that no church, or place of public worship, nor any school-house, should be taxed by any law of this State. The word 'taxes' means burdens, charges, or impositions put or set upon persons or property for public uses, and this is the definition which Lord Coke gives to the word talliage (2 *Inst.*, 532), and Lord Holt (*Carth.*, 438) gives the same definition, in substance, to the word 'tax.' To pay for the opening of a street, in a ratio to the benefit or advantage derived from it, is no *burden*. It is no talliage or tax, within the meaning of the exemption."

In *Northern Liberties* vs. *St. John's Church*, 1 Har. (Penn. R.) 104, the same question arose, and the superior court of Pennsylvania put the same construction on the word "tax," and held that the church property, though exempt from taxation under the general revenue law, was nevertheless subject to local assessments, appropriated to the improvement of the property itself; the court remarking that, "taxes are a public imposition levied by the authority of the Government for the purpose of carrying it on in all its machinery and operations. They are imposed for a public purpose; whereas municipal charges are often for the benefit of lot-holders on a particular street, and the assessment, as in this instance, induced by the request of a majority of the inhabitants, made known according to the charter."

In the *Egyptian Levee Co.* vs. *Hardin*, 27 *Missouri*, 495, it appears that for the purpose of reclaiming from liability to inundation a district of country between the Des Moines, Fox, and Mississippi rivers, in Clark county, a company was chartered by the legislature of Missouri, authorized to construct levees and dig canals, and raise the fund necessary for such construction by a tax, not to exceed fifty cents per acre, upon the land-holders in the district embraced within the charter. Each land-owner was al-

lowed a vote in the control of the work for every forty acres of land he owned in the limits. The towns of Alexandria and Churchville, with their additions, were excepted from the operation of the charter, although within the district of country embraced by it. Suit was brought to recover some of the assessments, and the defence was that the act of the legislature was unconstitutional, because the land was taxed by the acre, and not in proportion to its value. The court said: "That provision of our State constitution which requires taxation to be proportioned to the value of the property on which it is laid is only applicable to taxation in its usual, ordinary, and received sense, and is therefore limited to taxation for general purposes alone, where the money raised by the tax goes into the State treasury or the county treasury, or the general fund of some city or town, and is applicable to any purpose to which the legislative body of such State, county or town, may choose to apply it, and is not intended to apply to local assessments, where the money raised is to be expended on the property taxed."

The same principle will be found decided by the supreme court of Arkansas in *Washington* vs. *The State*, 13 *Ark. R.*, 752.

Other cases could be cited, but these will suffice to show the uniform construction which the judiciary have put upon the terms, "taxes," and "taxation," as employed in their constitutions and revenue laws. And when we apply the rule, already alluded to, that exemptions must be strictly construed, it becomes a perfectly clear and indisputable proposition, that the 14th section of the act of 1851 never did intend to exempt swamp lands from these special local assessments, to be levied and expended for the benefit of the lands themselves, by making and repairing levees to protect them; and if the levee act of 1857 has that object in view only, it is obnoxious to no constitutional objection, whether repealed or unrepealed, and the obligation of no contract was impaired, because, as to that, no contract ever existed.

Now by the levee act of 1857, it was provided that there should be levied and collected in the county of Chicot an annual levee tax on all alluvial lands in such county, *that would be benefited by levees*, the rate thereof to be fixed by the county court for each year, commencing with 1857, at not less than one-fourth of one per centum, nor more than one per centum upon the assessed value of said land; the assessment and valuation to be fixed by levee inspectors, whose election is provided for by the act; no land to be valued at less than ten dollars per acre; that each levee inspector shall be the sole judge, and embrace in his assessment list *such lands only as would be benefited by levee work;* and these assessments are to be returned to the clerk of the county, and the amount of levee tax on each tract is placed on the tax-book, and the sheriff is required to collect the same, and pay it over to the treasurer of the board of

inspectors, as a levee fund; and to be *expended in making and repairing levees in the county* in the manner prescribed by the act.

These are the general features of the act, and which seems to have been carefully drawn and considered; and, although there are some parts of it, when separately viewed, which might seem to produce inequality, yet, as a whole, the result of it appears to be the establishment of a just and equitable system, founded upon the great principle of taxation, that those who are benefited should bear the burden. It was intended to establish a general and permanent system of leveeing against the inundations of the Mississippi river, and tributary streams, and which could probably be more effectually done in that way than any other.

The power of the legislature upon the subject of taxation is sovereign, and only limited by the Constitution, and the compact between this State and the United States.

It is perceived by the act in question, the levee inspectors are the sole judges of what lands would be benefited by levee work, and their assessment, made under oath, must contain lands of that description. In view of the difficulty of deciding by any ordinary mode, what lands would be benefited by levee work, it was intended to be, and was left to the sound discretion of the five inspectors, elected by the people at short and stated periods, and they are, in the words of the law, constituted "sole judges" of what lands would fall within that category, and be subject to assessment and taxed accordingly, subject only to the power of the board of levee inspectors to adjust the assessment and levy of the tax, at the annual meeting in May, "by hearing and deciding all questions relating to the improper assessment and taxation of any land, or the omission to assess and tax any land legally taxable under the provisions of the act, and to make additions to, or deductions from the taxes as charged in such list upon any land, or against any person whatsoever;" and for the purpose of affording any person an opportunity to come forward and contest, notice is required to be given, and the decision of the board of inspectors is declared final and conclusive, and the land thus assessed and passed on and taxed is subject to the tax fixed, and it must be collected and paid over to the treasurer of the board. It is true, that under this act, all the lands in the county may not be subject to a levee tax, but only such as are benefited by levees; but this can hardly be urged as an objection against the law, and being a question of policy and expediency, would not, in any event, touch its constitutionality.

At the session of the legislature for 1858, special levee laws were passed for Desha, Phillips, Crittenden, and Mississippi counties, resembling in their main features the Chicot act, and differing only in the mode of execution, and in the amount of tax, and which is fixed by these acts at a higher rate. *Acts of* 1858, *pages* 153, 217.

If the Chicot act cannot be maintained, neither can the others; and so a system commenced in this State, which has already produced almost magical benefits, and if continued, is bound to produce still greater, is to be arrested, simply because those who take up thousands upon thousands of acres of swamp land, at small prices, choose to complain of taxation. Lands of unsurpassed fertility in river counties, but needing levees to reclaim or protect them from annual floods, are to remain in their natural state uncultivated and unimproved, and to be and continue "garrisons of disease," simply because an attempt to reclaim them by the only effectual instrument—a special levee law and tax—is met by resistance from the speculator, and who endeavors to make it plausible by hair-splitting theories and sophistical refinements on constitutional law. It cannot be—and I take it that the levee system is to prevail, and ought to prevail; and that if Mr. McGehee or others do not wish to pay the tax, they must part with their lands to those who will. They surely cannot be permitted to hold them, discharged of all burdens, when every foot of levee constructed by the money and work of their neighbors, affords to their own lands proportionable and equal protection.

Every one ought to anticipate with joy the day when every county on our navigable rivers shall be fully protected and secured by continuous levees; and the most efficient, certain, and, indeed, only mode of securing this great end, is by a special levee tax, whereby the willing and unwilling are alike obliged to contribute proportionably for their own benefit. And if the tax may seem heavy, there is always the consolation attending it, that it falls upon those best able to pay, and it is probably only when the tax-gatherer appears, that men are forcibly reminded that wealth has its disadvantages, and poverty its blessings.

S. H. HEMI

Counsel for Defend

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Counsel for Defendants in Error.